

FILED

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

Apr 12, 2021
Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 20N-00118

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on March 2, 2021 at 2:13 p.m.

APPEARANCES

For Petitioner: [REDACTED] daughter and power-of-attorney

For Respondent: [REDACTED] Administrator

STATEMENT OF ISSUE

Petitioner appeals Respondent's action on December 18, 2020 to discharge him from [REDACTED] (the "Facility").

Respondent carries the burden of proof by clear and convincing evidence that the discharge is appropriate.

SUMMARY OF PROCEEDINGS

This matter was previously assigned to Hearing Officer, Mary Jane Stafford. The appeal was transferred and reassigned to the undersigned.

Appearing as a witness for Petitioner was his wife, [REDACTED]

Appearing as witnesses for Respondent were [REDACTED] Social Services Director ("SSD") (Resp't Wit. 1), and [REDACTED] Regional Clinical Director (Resp't Wit. 2).

Petitioner provided evidence that was marked and entered as Petitioner's Exhibits "1" through "3."

Respondent provided evidence that was marked and entered as Respondent's Exhibit "1."

The record was held open until March 5, 2021 to allow both parties to submit additional evidence.

Evidence was received and were marked and entered as Petitioner's Exhibits "4" through "6" and Respondent's Exhibits "2" through "7."

The record was closed on March 5, 2021.

Petitioner's Position

Petitioner believes he did not initiate the discharge. Petitioner believes that on December 11, 2020, Petitioner's physician, [REDACTED] informed Petitioner he could be discharge home. Petitioner believes Respondent was informed that his wife was having surgery and that it would not be safe to discharge Petitioner home, as his wife was unable to care for him. Petitioner believes that Respondent no longer wanted Petitioner at the facility because they no longer wanted to provide one-on-one care.

Respondent's Position

Respondent took the position that Petitioner's 100th day of Medicare coverage ended on December 21, 2020 but he was not required to leave the facility due to having a pending Medicaid application. Respondent believes Petitioner and his spouse

initiated the discharge because both wanted him to be discharged from the facility to his home, effective [REDACTED] 2020.

FINDINGS OF FACT¹

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. On November 5, 2020, Petitioner was determined to be incapacitated by [REDACTED], Psy.D. (Pet'r Ex. 5.)
2. On [REDACTED] 2020, Petitioner was discharged from the facility to be admitted into the hospital for an MRI. On, or around, [REDACTED] 2020, Petitioner was admitted back into the facility. Upon Petitioner's admission back into the facility, he was provided with one-on-one supervision twenty-four hours per day at seven days per week due to his tendency to elope from his bed. (Pet'r Ex. 1 and Hr'g R.)
3. Petitioner has several diagnoses, some of which include a history of falling, unsteadiness on feet, other acute kidney failure, unspecified encephalopathy, heart failure, Parkinson's disease, chronic obstructive pulmonary disease, major depressive disorder, anxiety disorder, and other frontotemporal dementia. (Resp't Ex. 5 at 1.)
4. On December 8, 2020, Respondent issued the *Notice of Medicare Non-Coverage* to Petitioner to inform him that, effective [REDACTED], 2020, Medicare will probably no longer pay for his skilled nursing services. Respondent is responsible for issuing a *Notice of Medicare Non-Coverage* to residents whose Medicare payments for skilled nursing service are ending to inform them of how many days are left, including

¹ Citations within the Findings of Fact and Conclusions of Law in this order follow Florida Rule of Appellate Procedure 9.800 and *The Bluebook: A Uniform System of Citation* as the standard for citation.

residents who are expected to remain at the facility for long-term care. (Pet'r Ex. 2 and Hr'g R.)

5. The *Progress Note*, dated December 14, 2020 and created by [REDACTED]

[REDACTED], Psy.D., includes the following notes resulting from Petitioner's assessment:

Physical Appearance:

...Showed normal alertness; good attentiveness; established eye contact; was oriented...reported the date was December 2010; and appeared well groomed...

Mental Status Examination:

...Speech was normal; slow and impoverished thinking; logic and coherent; irritable; fair memory with difficulty recalling events; fund of knowledge appeared mildly deficient; fair judgement regarding current situation and needs; and appeared to have a cognitive decline during the assessment.

Goals:

...Patient obtain [sic] average scores in areas that measure working memory. However the patient showed impaired verbal fluency and confusion with abstract reasoning. The patient became resistant to continue testing and asked the psychologist to end the evaluation. The scores obtained provide a limited profile of capacity. The patient was falling asleep while answering some of the initial tests. He was disoriented to time. Home health aide is strongly recommended and support from family member to assist with healthcare decisions such as making appointments, taking prescriptions correctly and future planning...

Diagnostic Impression(s): Pt prognosis in treatment is poor due to lack of awareness of symptoms.

Screening results: Patient's inability to recognize emotional and cognitive difficulties is an indicator of poor prognosis.

With the scores obtained and his presentation during evaluation, psychologist found him to be incapable of making own healthcare decisions due to disorientation, lack of awareness/insight and impairment in cognitive abilities. Home health aide strongly recommended...

(Resp't Ex 3 at 2.)

6. On December 17, 2020, Respondent's SSD spoke with Petitioner's spouse by telephone and was informed that Petitioner's spouse was having surgery and would not be able to provide care for Petitioner. Petitioner's last covered date under skilled service was extended to December 21, 2020 because Petitioner's spouse was undergoing surgery and because Petitioner was no longer making progress. Progress

Notes dated December 17, 2020 state: "SS explained that resident is covered through Monday 12/21 under is [sic] Medicare benefit. Petitioner's spouse advised 'he thinks he is coming home Friday [sic] so I have to try'." (Resp't Ex. 3 at 4 and Resp't Wit. 1 Test.)

7. The *Order Summary*, ordered by Petitioner's primary physician, [REDACTED], is dated December 17, 2020 and states: "[REDACTED] home on 12/18/20 with spouse, all meds and [REDACTED] SN, PT, OT, HHA and MSW."

Respondent set up Petitioner's medications and home health care services through Pinnacle. (Resp't Ex 2, Resp't Ex. 5, and Resp't Wit. 1 Test.)

8. On December 18, 2020, Respondent met with Petitioner's spouse at the facility to discuss Petitioner's discharge from the facility. The *Post Discharge Plan of Care* (the "Plan of Care") was issued to Petitioner's spouse to provide information on resources, appointments, dietary and nutritional needs, and other instructions to assist with Petitioner's care after his discharge from the facility. Petitioner's copy of the Plan of Care has a note at the bottom which states: "I do not believe this to be a safe discharge." Respondent's copy of the Plan of Care does not have a note at the bottom. Respondent's business practice includes date stamping and scanning copies of the original documents into its computer system and providing the originals to the resident. (Pet'r Ex. 3, Resp't Ex. 4, and Resp't Wit. 2 Test.)

9. It is the facility's practice to issue a *Nursing Home Transfer and Discharge Notice* to every patient who is being discharged from the facility, even for discharges from the facility that are initiated by the resident and/or resident's family. (Resp't Wit. 1 Test.)

10. On December 21, 2020, a Nursing Home Transfer and Discharge Notice was issued, with an effective date of [REDACTED] 2020. Respondent is seeking to

discharge Petitioner due to his "...health has improved sufficiently so that you no longer need the services provided by this facility." Respondent included a brief explanation at the bottom of the notice which states: "Transferred Home/ resident & spouse request." (Resp't Ex. 1.)

11. Petitioner is not able to pull himself up out of his wheelchair and is unable to do most things, including going to the bathroom, on his own. Petitioner is now residing at a facility one hour away from the family. Petitioner's spouse and daughter wish for him to return to Respondent's facility. (Hr'g R.)

CONTROLLING LAW

12. Section 400.0255(15), Florida Statutes, provides the Department of Children and Families, Office of Appeal Hearings, jurisdiction over the subject matter of this proceeding and the parties. This section further prescribes this order as the final administrative decision of the Department of Children and Families.

13. Title 42 Code of Federal Regulations Section 483.15 sets forth the reasons a facility may involuntarily discharge a resident as follows: Admission, transfer and discharge rights.

(c) Transfer and discharge—(1) Facility requirements—(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—

(A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(B) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(D) The health of individuals in the facility would otherwise be endangered;

(E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility.

Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including

Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

(F) The facility ceases to operate.

(ii) The facility may not transfer or discharge the resident while the appeal is pending, pursuant to §431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to §431.220(a)(3) of this chapter, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

(2) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) Documentation in the resident's medical record must include:

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

(B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

(B) Resident representative information including contact information.

(C) Advance Directive information.

(D) All special instructions or precautions for ongoing care, as appropriate.

(E) Comprehensive care plan goals,

(F) All other necessary information, including a copy of the resident's discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

3) *Notice before transfer.* Before a facility transfers or discharges a resident, the facility must—

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and

manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (c)(5) of this section.

(4) *Timing of the notice.* (i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when—

(A) The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section; or

(E) A resident has not resided in the facility for 30 days.

(5) *Contents of the notice.* The written notice specified in paragraph (c)(3) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

CONCLUSIONS OF LAW

14. Because there is a disputed relevant fact (handwritten note at the bottom of Petitioner's copy the *Post Discharge Plan of Care* versus Respondent's copy of the same document) the undersigned must make the finding. Petitioner's spouse recounted how she handwrote "I do not believe this to be a safe discharge" at the bottom of the Plan of Care on December 18, 2020 while reviewing the discharge plan with Respondent. Respondent testified that the facility provided the original Plan of Care

document to Petitioner's spouse and date stamped and scanned the copy into its computer system and that its copy does not include the handwritten statement. Based on the above, the undersigned finds that Respondent's copy reflects the state of the original *Post Discharge Plan of Care* that was signed by both parties on December 18, 2020. Therefore, the undersigned also finds that Respondent was not aware of Petitioner's spouse's handwritten statement to show her concern about the safety of Petitioner's discharge from facility at the time of the review.

15. The above controlling authority explains the six allowable reasons for discharge from a nursing facility. The findings show that Respondent issued the *Nursing Home Transfer and Discharge Notice* to Petitioner, citing the reason for discharge as: "Your health has improved sufficiently so that you no longer need the services provided by this facility." The undersigned concludes that this is one of the six reasons provided in federal regulations for which a nursing facility may involuntarily discharge a resident.

16. The above controlling authority explains that the resident's physician must document a resident's medical records to demonstrate that his health has sufficiently improved so that the services provided by the facility are no longer needed. The findings show that the progress notes dated December 14, 2020 include notes from an examination by Joselene Martinez, Psy. D., who notated that while Petitioner was alert, attentive, oriented, and well-groomed during her assessment, he does not have the ability to recognize emotional and cognitive difficulties. The findings also show that the psychologist notated in the progress notes that Petitioner is incapable of making his own healthcare decisions due to his disorientation, lack of awareness, and impairment of cognitive abilities. The findings show that based on the assessment done by the

psychologist, Petitioner's prognosis in treatment is poor due to his lack of awareness of symptoms. The undersigned concludes that Respondent did not meet its burden to prove by clear and convincing evidence that Petitioner's health has improved sufficiently so that he no longer requires the services provided at the facility.

17. The above controlling authority explains that at least 30 days prior to any proposed transfer or discharge, the facility must provide advance notice of the proposed transfer or discharge to the resident and family member or legal representative. The findings show that Respondent issued the *Nursing Home Transfer and Discharge Notice* to Petitioner on December 21, 2020 with an effective date of [REDACTED] 2020. The findings also show that Respondent issued the *Nursing Home Transfer and Discharge Notice* with an explanation at the bottom which indicates Petitioner was being transferred home at the request of Petitioner and his spouse. The findings show that Respondent's business practice includes issuing a discharge notice even in cases where the resident and resident's family initiate the discharge from the facility. The findings show that Respondent was not aware of Petitioner's spouse's concern that she felt that Petitioner's discharge from the facility was not safe when reviewing *Post Discharge Plan of Care*. However, the findings do not show that Petitioner's spouse initiated the discharge action. Therefore, the undersigned concludes that Respondent did not meet its burden to prove by clear and convincing evidence that Petitioner and his spouse initiated his discharge from the facility. The undersigned further concludes that the discharge notice issued by Respondent was not in compliance with the requirement to provide a 30-day advance notice prior to a proposed transfer or discharge.

DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility is ORDERED to immediately readmit Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

NOTICE OF RIGHT TO APPEAL

The decision of the hearing officer is final. Any aggrieved party may appeal the decision to the district court of appeals in the appellate district where the facility is located. Review procedures shall be in accordance with the Florida Rules of Appellate Procedure. To begin the judicial review, the party must file one copy of a "Notice of Appeal" with the Office of Appeal Hearings, Suite I, Room 129, 2415 North Monroe Street, Tallahassee, FL 32303-4190. The party must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.

DONE and ORDERED this 12 day of April, 2021,

in Tallahassee, Florida.



Paula Ali
Hearing Officer
Suite I, Room 129
2415 North Monroe Street
Tallahassee, FL 32303-4190
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [redacted] Petitioner
[redacted] Respondent
[redacted]
Agency for Health Care Administration
[redacted]